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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1312

NATIONAL BUS TRAFFIC ASSOCIATION, INC., ET AL.,
Appellants,

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Appellees.

On Appeal From the United States District Court for the Northern District of Illinois, Eastern Division

JURISDICTIONAL STATEMENT

NATIONAL BUS TRAFFIC ASSOCIATION, INC.
GREYHOUND LINES, INC.
TRANSCONTINENTAL BUS SYSTEM, INC.
AMERICAN BUSLINES, INC.

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Dated: April 10, 1968

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No. .

NATIONAL BUS TRAFFIC ASSOCIATION, INC., ET AL.,
Appellants,

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Appellees.

On Appeal From the United States District Court for the Northern District of Illinois, Eastern Division

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JURISDICTIONAL STATEMENT

Appellants, National Bus Traffic Association, Inc.; Greyhound Lines, Inc.; Transcontinental Bus System, Inc.; and American Buslines, Inc., appeal from the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, entered on December 11, 1967, dismissing the complaint against

a report and order of the Interstate Commerce Commission, and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the District Court is not yet reported in the Federal Supplement, but copies of the opinion and order as released by the Court are attached hereto as Appendix A. A copy of the decision and order of the Interstate Commerce Commission, by its Operating Rights Review Board No. 3, in Docket No. MC-125115 (Sub No. 2), *Louis Rosenbaum Common Carrier Application,* dated April 28, 1966, and served May 9, 1966, is attached hereto as Appendix B. A copy of the report and recommended order of the Hearing Examiner in that proceeding, served January 6, 1966, is attached hereto as Appendix C.

JURISDICTION

This suit was brought under 28 U.S.C. §§1336, 1398, 2284, and 2321-2325 to enjoin and set aside the decision and order of the Interstate Commerce Commission. (Appendix B) The judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was entered on December 11, 1967, and notice of appeal was filed in that court February 9, 1968. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by sections 1253 and 2101(b) of the Judicial Code, 28 U.S.C. §§1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment in this case on direct appeal: *United States v. Drum,* 368 U.S. 370 (1962); *American*

Trucking Associations, Inc. v. *United States*, 364 U.S. 1 (1960); *Frozen Food Express, Inc.* v. *United States*, 351 U.S. 40 (1956).

STATUTES INVOLVED

The relevant statutory provisions are the National Transportation Policy, 49 U.S.C. preceding §§ 1, 301, 901, and 1001; and section 207 of the Interstate Commerce Act, 49 U.S.C. §307. They are set forth verbatim in Appendix F, attached hereto.

QUESTIONS PRESENTED

1. Whether the Court erred in sustaining the Commission's grant of new, regular route, point-to-point operating authority as a motor common carrier of passengers on the principal ground that the use of Spanish-speaking drivers so distinguishes the proposed service from admittedly adequate existing service as to support the finding that it is required by public convenience and necessity?

2. Whether the Court erred in approving the Commission's grant of a certificate under section 207 of the Interstate Commerce Act predicated, in part, upon a theory that the action might help curb unlawful transportation activities by unknown persons not party to the proceeding?

3. Whether the Court erred in approving the Commission's grant of authority to transport passengers between El Paso, Texas, and Los Angeles, California, in the complete absence of evidence of passengers originating at Los Angeles, California, for either one-way or round-trip movement?

4. Whether the Court erred in approving the Commission's decision in the light of the Congressional

intention declared in the National Transportation Policy "to provide for fair and impartial regulation" and its requirement that the Act be administered "to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers"!

STATEMENT OF CASE

By application filed January 5, 1965, Louis Rosenbaum, doing business as El Paso-Los Angeles Limousine Express of El Paso, Texas, sought from the Interstate Commerce Commission a certificate of public convenience and necessity authorizing transportation in interstate and foreign commerce as a common carrier by motor vehicle of passengers and their baggage in limousine service between El Paso, Texas, and Los Angeles, California, over a specified regular route. A hearing was held on the application, and the Hearing Examiner recommended that the application be granted. (Appendix C) On exceptions to that report and recommended order, the Commission, Operating Rights Review Board No. 3, entered the decision and order assailed (Appendix B) in which it adopted the findings and conclusions set forth in the Examiner's report, with a minor modification. Petitions for reconsideration and for a finding that the proceeding involved an issue of general transportation importance, thus warranting consideration by the entire Commission, were denied by orders dated September 6, 1966 (Appendix D) and December 14, 1966 (Appendix E), respectively. Pursuant to section 17 of the Interstate Commerce Act, 49 U.S.C. § 17, and Rule 101 of the Commission's General Rules of Practice, 49 C.F.R. § 1100.101, the assailed decision was, therefore, administratively final.

Appellants, who were protestants before the Commission, filed a complaint in the United States District Court for the Northern District of Illinois, Eastern Division in Civil Action 67-C-265 to annul and set aside the Commission's decision and order. On December 11, 1967, the District Court affirmed the decision and order and dismissed the complaint. (Appendix A)

THE QUESTIONS ARE SUBSTANTIAL

1. The issue raised by this appeal is whether the Commission may grant a certificate of public convenience and necessity for a new motor-carrier passenger service, after expressly finding existing service to be adequate, because of certain "extras" proposed by the applicant and because the proposed service might help curb unlawful passenger transportation. Appellants submit that the reasons given for granting the new certificate by the Commission and approved by the District Court do not measure up to the "public convenience and necessity" standard established in the statute, nor comport with the National Transportation Policy.

2. In the first year of its regulation of motor carriage, the Commission interpreted the "public convenience and necessity" standard in section 207 of the Interstate Commerce Act, 49 U.S.C. § 307:

> "The question, in substance, is whether the new operation or service will serve a useful public purpose, responsive to a public demand or need; whether this purpose can and will be served as well by existing lines or carriers; and whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest." [1]

[1] *Pan American Bus Lines Operation*, 1 M.C.C. 190, 203 (1936).

This landmark interpretation of public convenience and necessity as a public demand or need for service not being adequately met by existing carriers, has been consistently followed by the Commission and has received judicial approval. In *Hudson Transit Lines* v. *United States*,[2] the District Court said:

> "The Commission has frequently held that under §207 of the Act, 49 U.S.C.A. §307, there must be an affirmative showing not only that a common carrier service is required in the convenience of the public but also that it is a necessity, and that the latter element includes a showing that present facilities are inadequate. The courts, too, have recognized inadequacy of existing facilities as a basic ingredient in the determination of public 'necessity'."

Subsequent to its report herein, the Commission, in an unprinted decision,[3] reaffirmed its long-recognized policy that the inadequacy of the existing service is one of the ingredients basic to the determination of public convenience and necessity:

> "The Commission has repeatedly indicated that in the absence of exceptional circumstances, existing carriers are entitled to all the traffic they can handle adequately, efficiently, and economically within the limits of their authorities before a new, competing service is authorized."

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[2] 82 F. Supp. 153, 157 (S.D.N.Y., 1948) (citations omitted), aff'd *per curiam* 338 U.S. 802.

[3] Docket No. MC-128601, *Glynn S. Boles Common Carrier Application*, decided April 27, 1967. Inasmuch as the *Boles* decision is not printed in the bound volumes of the Commission decisions, it is reproduced, in full, in Appendix G.

After summarizing the evidence showing the adequacy of the existing service, the Commission in the *Boles* case concluded:

> "In the circumstances, we cannot conclude that there is any justification for departing from the general rule that existing carriers should be allowed to handle the available traffic without added competition if they are able to provide adequate service."[4]

3. The instant decision represents a radical departure from the otherwise consistently-followed policy that a proposed new service must be responsive to a reasonable public demand which is not being adequately met by the existing carriers. To distinguish the proposed service, the Commission placed particular emphasis upon applicant's proposed use of Spanish-speaking drivers and concluded that "there is a definite need for a more considerate service." (Appendix C, p. 9) The use of bi-lingual drivers and the other factors considered as distinguishing the proposed service[5] are not the sort of transportation characteristics which have in the past been considered as establishing a reasonable public demand for a new and different service.

In *D. C. Transit System, Extension—Limousine Service,*[6] the Commission declined to approve a new passenger service in which applicant proposed to use specially-built limousines, equipped with special air-

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[4] *Id.*

[5] "But beyond that [use of Spanish-speaking drivers], the service proposed is in fact distinctive. It will assure the witnesses and those they are representative of that their baggage will arrive with them; it will afford them more comfort than a bus, it will afford faster service." (Appendix C, p. 9)

[6] 81 M.C.C. 737 (1959).

line-type reclining seats, magazine stands, desk-type tables, air conditioning, telephone service, dictating machines, and rear baggage storage space. Relying on the *D. C. Transit* decision, the Commission denied an earlier application of the applicant herein. (Appendix C, pp. 3, 8) [7] Both the *D. C. Transit* decision and the denial of Rosenbaum's prior application were based on the conclusion that the "extras" proposed, although possibly attractive to a limited number of persons, were not so distinctive as to constitute a new and needed service. In the assailed decision, however, the Commission did not discuss this basic issue, but sought to distinguish the instant case on evidentiary grounds.[8] Likewise, the District Court treated this suit as one which turns primarily upon the question of the substantiality of the evidence, rather than upon the correctness of the standard to be applied.[9]

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[7] In the prior report, as quoted in Appendix C, the Board concluded:

> "Although the features which applicant would offer might be attractive to a limited portion of the travelling public, we are not persuaded that they are so distinctive as to transform what is essentially a regular-route, point-to-point service into a new and specialized type of motor carrier operation for which there is a public demand."

[8] After quoting the conclusion in the preceding footnote, the Commission said:

> "The quoted sentence is, except for the final phrase, a direct quote from the *D.C. Transit* case cited. The finding is, therefore, that the two cases are identical. Whatever the evidence was in the prior application, the evidence in the present case does not warrant the conclusions in the *D.C. Transit* case. . . ." (Appendix C, p. 8)

[9] Even on evidentiary grounds the Commission decision is deficient because it granted authority *between* El Paso and Los Angeles. All of the evidence relates only to service originating at El Paso and there is not one shred of evidence respecting a need for service originating at Los Angeles.

4. A reversal of agency policy calls for thorough analysis and explication.[10] In *City of Lawrence* v. *Civil Aeronautics Board*,[11] the First Circuit Court of Appeals stated that agency reversal, without explanation, of prior decisions, or departure from the reasoning and holding in similar proceedings, is arbitrary and capricious and must be reversed. Here the Commission has departed from its established standard that a proposed new service must be responsive to a reasonable public demand or need not being adequately served by the existing carriers. Although recognizing that protestant-appellants "no doubt provide adequate bus service" (Appendix C, p. 9), the Commission has approved a new, competitive service primarily because of the proposal to use Spanish-speaking drivers. Admittedly there is no need for bi-lingual drivers as the protestants announce arrivals and departures in Spanish. (Appendix C, p. 9) The approval herein was manifestly based on the preference of the witnesses for Spanish-speaking drivers. However, public support based upon language, nationality, or racial preference is not justification for approval of a new service.[12]

5. The Commission's secondary ground for approval is the completely unsupported statement that the "success of applicant's operation may tend to reduce the amount of unlawful operations." (Appendix C, p. 9) This is clearly not a conclusion based on the record

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[10] *ABC Air Freight* v. *Civil Aeronautics Board*, —— F. 2d —— (2d Cir. 1968). Docket No. 31795, decided March 13, 1968).

[11] 343 F. 2d 583, 588 (1965). See also *Transcontinental Bus System, Inc.* v. *Civil Aeronautics Board*, 383 F. 2d 466, 491 (adv. sheets) (5th Cir. 1967).

[12] See *Boles*, Appendix G.

herein, but a hoped-for side effect of the grant. But even if the record justified an affirmative finding that the proposed service would tend to reduce existing illegal operations, it would not meet the public convenience and necessity standard in the statute. The proper method of combatting illegal operations is better enforcement, not the approval of additional, competitive operations where the existing service is adequate.

6. In the National Transportation Policy, Congress has declared that the Interstate Commerce Act is to be administered and enforced in a manner, among others, to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation. This Court said in *Schaffer Transportation Co.* v. *United States*,[13] that the Policy is the "yardstick by which the Commission's actions will be measured." The instant decision fails to measure up to that standard. The appellant carriers are those ordinary regular-route carriers upon which "the public must depend for its day-to-day basic transportation."[14] The regulatory scheme of the Interstate Commerce Act places upon them the obligation to provide a reasonably continuous and adequate service designed to meet the need of that public and, in exchange, is intended to protect them from new, unnecessary competition. The public interest in a sound national transportation system is not served by confronting existing carriers with new competitive service based on trivial added features designed to meet the preference of a

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[13] 355 U.S. 83, 87-88 (1957).

[14] *Asbury Park—N. Y. Transit Corp.* v. *Bingler Vacation Tours*, 62 M.C.C. 731, 746 (1959).

limited number of persons. The Commission itself has long so-recognized:

> "The best interests of the public as a whole are not served by the establishment of duplicating facilities which, although providing a small measure of additional convenience to some, endanger the efficiency of existing facilities to the detriment of the majority." [15]

The approval herein is based upon factors directed toward providing such a "small measure of additional convenience to some" rather than upon any fundamental inadequacy in the existing service. Unless reversed, it stands as a precedent for other grants of authority based on factors of slight added convenience and the weakening of the well-considered and long-established interpretation of "public convenience and necessity" heretofore applied in cases of applications for new authority.

CONCLUSION

The questions presented by this appeal are substantial and are of public importance. For the reasons stated, appellants urge that jurisdiction be noted and that the judgment of the District Court be reversed

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[15] *E. Vanderhoof & Sons, Extension—West Orange*, 52 M.C.C. 755, 771 (1951); *Greenville Bus Co., Common Carrier Application*, 79 M.C.C. 387, 394 (1959).

and the case remanded to that Court for disposition consistent with the Court's opinion.

Respectfully submitted,

NATIONAL BUS TRAFFIC ASSOCIATION, INC.
GREYHOUND LINES, INC.
TRANSCONTINENTAL BUS SYSTEM, INC.
AMERICAN BUSLINES, INC.

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DATED: APRIL 10, 1968

APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

67 C 265

NATIONAL BUS TRAFFIC ASSOCIATION, INC., GREYHOUND LINES, INC., TRANSCONTINENTAL BUS SYSTEM, INC., AMERICAN BUSLINES, INC., Plaintiffs,

v.

THE UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION, Defendants,

LOUIS ROSENBAUM, d/b/a EL PASO-LOS ANGELES LIMOUSINE EXPRESS, Intervening Defendant.

Before HASTINGS, Circuit Judge, and WILL and LYNCH, District Judges.

Per Curiam. The plaintiffs seek to vacate and permanently enjoin a decision and order of the Interstate Commerce Commission which granted a certificate of public convenience and necessity to Louis Rosenbaum, doing business as El Paso-Los Angeles Limousine Express of El Paso, Texas (hereinafter referred to as Rosenbaum). The certificate authorizes the operation of a limousine service for carrying passengers and their baggage between El Paso and Los Angeles over regular routes in nine-passenger vehicles, serving no intermediate points. Rosenbaum has intervened as a defendant.

On January 5, 1965, Rosenbaum filed an application with the Commission for a certificate of public convenience and necessity under Section 207 of the Interstate Commerce Act, 49 U.S.C. §307 (1964). The plaintiffs protested the application and a hearing thereon was held on October 4-6, 1965, at El Paso, Texas, before an examiner. In his report,

the examiner recommended that the applicant be granted the authority sought. The plaintiffs filed exceptions to the examiner's report and the applicant filed a reply. The matter was reviewed by the Commission and on April 28, 1966, the Commission adopted the examiner's report in its decision and order and granted the certificate. Subsequent petitions by the plaintiffs for reconsideration of the matter have been denied and the defendants admit that the plaintiffs have exhausted their administrative remedies and that this case is therefore ripe for judicial review.

The applicant proposes to furnish a passenger transportation service between El Paso and Los Angeles, using nine-passenger station wagons operated by drivers who speak Spanish. Twenty-seven witnesses appeared before the hearing examiner in support of the application. Their testimony disclosed that persons of Mexican ancestry who reside in El Paso, or at nearby points in Mexico and who have occasion to travel between El Paso and Los Angeles, are confronted by a language barrier. These persons are often confused although the existing carriers maintain Spanish-speaking personnel at their terminals and announce their departures and arrivals in both English and Spanish. They also testified that the passengers' baggage sometimes did not arrive with the passengers. Several witnesses testified that they found a limousine service more comfortable than a bus service and that they preferred the faster service offered by the applicant. The testimony disclosed further that various wildcat limousine services are currently operating between Juarez, Mexico and Los Angeles, and that a number of persons use these illegal services rather than the existing bus service. The examiner found that the limousine service proposed by the applicant is "distinctive." This finding of distinctiveness was based on four elements: more comfort, movement of baggage on the same vehicle with passengers, faster service, and drivers who speak Spanish. The examiner also found that the applicant's potential market consisted largely of those

persons whom plaintiffs had already lost to the wildcat operations and that, therefore, plaintiffs' operations would not be adversely affected by the applicant's success.

The Commission adopted the report of the examiner. It found that the existing carriers provided an adequate service to the exent that they were able to do so, but that the distincitive type of service that was proposed justified a grant of authority to Rosenbaum despite the existence of the other passenger carriers. It also considered evidence that the applicant's operations would have an adverse effect on the wildcat carriers and concluded that the issuance of a certificate of public convenience and necessity to the applicant might tend to curb such illegal operations.

The United States Supreme Court has frequently held that orders of the Interstate Commerce Commission should not be set aside, modified, or disturbed by a court on review if they lie within the scope of the Commission's statutory authority and are based upon adequate findings which are supported by substantial evidence upon the record as a whole, even though the court might have reached a different conclusion on the facts presented. *Gilbertville Trucking Co., Inc.* v. *United States,* 371 U.S. 115, 126 (1962); *United States* v. *Pierce Auto Freight Lines,* 327 U.S. 515, 535-36 (1946); *Mississippi Valley Barge Lines Co.* v. *United States,* 292 U.S. 282, 286-87 (1934).

The courts have recognized that Congress has delegated to the Commission a broad discretion in determining what constitutes "public convenience and necessity" under Section 207(a) of the Interstate Commerce Act. 49 U.S.C. §307(a) (1964). *Interstate Commerce Commission* v. *Parker,* 326 U.S. 60, 65 (1945); *United States* v. *Detroit & Cleveland Navigation Co.,* 326 U.S. 236, 241 (1945). It is for the Commission to determine whether the public convenience and necessity require the issuance of a certificate authorizing interstate motor carrier operations. Accordingly, the instant action should be tested by the norm which limits our

consideration and review to a determination of whether there was a "rational basis . . . supported by substantial evidence." *A. L. Mechling Barge Lines, Inc.* v. *United States,* 218 F.Supp. 837, 839 (N.D. Ill. 1963). We conclude that such a basis exists here for the order entered.

The Commission determined that a certificate of public convenience and necessity should be issued to the applicant. It concluded that the certificate was justified by the distinctive type of passenger service which was proposed. The record discloses that the proposed service was designed: to be faster, to overcome the language barrier encountered by Spanish-speaking people, to assure arrival of luggage along with the passenger, to be more comfortable than travel on buses, and to be more advantageous to Spanish-speaking people. The proposed service might also be instrumental in curbing existing illegal passenger services operating in the area. This record provides substantial evidence to support the Commission's conclusion.

Plaintiffs urge that the elements considered by the Commission, particularly the fact that Spanish-speaking drivers will make travel more convenient for Spanish-speaking passengers, are improper grounds for issuance of a certificate. They contend, in terrorem, that if these are relevant factors, they would equally support the issuance of a certificate to an applicant who proposed using Italian-speaking drivers in a service between New York and Pittsburgh or other comparable applications.

Each case must, of course, stand on its own facts. Service between El Paso, situated on the Mexican border just opposite the city of Juarez, and Los Angeles, is a substantially different question than service between New York and Pittsburgh. We hold only that the Commission's action here was within its statutory power; that its order is based upon adequate findings supported by substantial evidence, and is in accordance with the applicable law. Accordingly, we conclude that the order and decision of the Commission

be affirmed and that the Complaint should be dismissed. An appropriate order will be entered.

/s/ JOHN S. HASTINGS
John S. Hastings
Circuit Judge, United States Court of Appeals for the Seventh Circuit

/s/ HUBERT L. WILL
Hubert L. Will
United States District Judge
Northern District of Illinois

/s/ WILLIAM J. LYNCH
William J. Lynch
United States District Judge
Northern District of Illinois

Dated: December 11, 1967

JUDGMENT ORDER

The above cause came on regularly for hearing before the Court on the 9th day of November, 1967, and was duly submitted for consideration and decision, and the Court on the 11th day of December, 1967, made its decision and filed its per curiam opinion. Now, therefore, pursuant thereto, it is hereby

ORDERED AND ADJUDGED that the Interstate Commerce Commission's order of April 28, 1966, be and it hereby is affirmed, and that the complaint be and it hereby is dismissed.

Dated: December 11, 1967

/s/ JOHN S. HASTINGS
John S. Hastings
Circuit Judge, United States
Court of Appeals for the
Seventh Circuit

/s/ HUBERT L. WILL
Hubert L. Will
United States District Judge
Northern District of Illinois

/s/ WILLIAM J. LYNCH
William J. Lynch
United States District Judge
Northern District of Illinois

APPENDIX B

Service Date
May 9, 1966

DECISION AND ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Operating Rights Review Board Number 3, held at its office in Washington, D.C., on the 28th day of April, A.D. 1966.

No. MC-125115 (Sub-No. 2)

LOUIS ROSENBAUM COMMON CARRIER APPLICATION
(El Paso, Tex.)

Upon consideration of the application and the record in the above-entitled proceeding, including the report and recommended order of the examiner, the exceptions thereto filed separately by National Bus Traffic Association, Inc., and by Greyhound Lines, Inc., and jointly by Transcontinental Bus System, Inc., and American Buslines, Inc., protestants, and the reply to the exceptions filed by applicant; and

It appearing, That, except as noted below, the foregoing pleadings raise no new or material matters of fact or law not adequately considered and properly disposed of by the examiner in his report, and are not of such nature as to require the issuance of a report discussing the evidence in the light of the pleadings;

It further appearing, That the examiner recommended the granting to applicant of a certificate of public convenience and necessity authorizing the operation, as modified herein, described in the appendix to this order;

And it further appearing, That the evidence warrants the imposition of a restriction limiting applicant's proposed limousine service to the transportation of not more than eight passengers in any one vehicle (not including the driver thereof);

Wherefore, and good cause appearing therefor:

We find, That the findings of the examiner should be, and they are hereby, modified for the reasons stated in the third appearing paragraph above, and in order to correct a minor error in the route description requested in the instant application;

And we further find, That the evidence considered in the light of the pleadings does not warrant a result substantially different from that reached by the examiner; and that the statement of facts, the conclusions, and the findings of the examiner, as modified herein, being proper and correct in all material respects, should be, and they are hereby, affirmed and adopted as our own; and

It is ordered, That said application, except to the extent granted herein, be, and it is hereby, denied.

It is further ordered, That upon compliance by applicant with the requirements of sections 215, 217, and 221(c) of the Interstate Commerce Act and with the Commission's rules and regulations thereunder, within the time specified in the next succeeding paragraph, an appropriate certificate will be issued.

And it is further ordered, That unless compliance is made by applicant with the requirements of sections 215, 217, and 221(c) of the act within 90 days after the date of service hereof, or within such additional time as may be authorized by the Commission, the grant of authority made herein shall be considered as null and void and the application shall stand denied in its entirety effective upon the expiration of the said compliance time.

By the Commission, Operating Rights Review Board Number 3, Members Freidson, Morris, and Mulhern.

H. NEIL GARSON,
Secretary.

(SEAL)

APPENDIX

No. MC-125115 (Sub-No. 2)

Louis Rosenbaum Common Carrier Application (El Paso, Tex.)

Service Authorized:

Operation by applicant, in interstate or foreign commerce, as a common carrier by motor vehicle, over regular routes, of passengers and their baggage, limited to the transportation of not more than eight passengers in any one vehicle, (not including the driver thereof), in limousine service, between El Paso, Tex., and Los Angeles, Calif., from El Paso over Interstate Highway 10 to Las Cruces, N. Mex., thence over U. S. Highway 80 through Lordsburg, N. Mex., to junction New Mexico Highway 14, thence over New Mexico Highway 14 to the New Mexico-Arizona State line, thence over Arizona Highway 86 to Benson, Ariz., thence over U. S. Highway 80 to Tucson, Ariz., thence over Arizona Highway 84 to Gila Bend, Ariz., thence over U. S. Highway 80 through Yuma, Ariz., to junction California Highway 98, thence over California Highway 98 to Calexico, Calif., thence over California Highway 86 (formerly U. S. Highway 99), to Indio, Calif., thence over Interstate Highway 10 to Los Angeles, and return over the same route, serving no intermediate points.

APPENDIX C

INTERSTATE COMMERCE COMMISSION

Served January 6, 1966

Notice To The Parties

Exceptions, if any, must be filed with the Secretary, Interstate Commerce Commission, Washington, D.C., and served on all other parties in interest, within 30 days from the date of service shown above, or within such further

period as may be authorized for the filing of exceptions. At the expiration of the period for the filing of exceptions, the attached order will become the order of the Commission and will become effective unless exceptions are filed seasonably or the order is stayed or postponed by the Commission. To be seasonably filed, exceptions must reach the Commission on or before the date they are due. If exceptions are filed, replies thereto may be filed within 20 days after the final date for filing exceptions.

Any new operation to be authorized by the recommended order herein if it becomes effective may not be commenced until such time as the certificate, permit, or license has actually been issued. The certificate, permit, or license will not be issued until the applicant has complied with the provisions of the Interstate Commerce Act and the requirements of the Commission thereunder. It should not be assumed that the recommended order has become effective as the order of the Commission until a notice to that effect, signed by the Secretary of the Commission, has been received.

No. MC-125115 (Sub-No. 2)

LOUIS ROSENBAUM, COMMON CARRIER APPLICATION

Decided

Issuance of a certificate of public convenience and necessity authorizing described operations as a common carrier by motor vehicle approved upon compliance by applicant with certain conditions.

M. Ward Bailey for applicant.

D. Paul Stafford and *Craig McAtee* for protestants.

REPORT AND ORDER
RECOMMENDED BY BERNARD J. HASSON, JR.,
HEARING EXAMINER

By application filed January 5, 1965, Louis Rosenbaum, doing business as El Paso-Los Angeles Limousine Express, of El Paso, Tex., seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle, over regular routes, of passengers and their baggage, in limousine service, between El Paso, Tex., and Los Angeles, Calif., from El Paso over Interstate Highway 10 to Las Cruces, N. Mex., thence over U.S. Highway 80 through Lordsburg, N. Mex to the New Mexico-Arizona State line, thence over Arizona Highway 86 to Benson, Ariz., thence over U.S. Highway 80 to Tucson, Ariz., thence over Arizona Highway 84 to Gila Bend, Ariz., thence over U.S. Highway 80 through Yuma, Ariz., to junction California Highway 98, thence over California Highway 98 to Calexico, Calif., thence over California Highway 86 (formerly U.S. Highway 99), to Indio, Calif., thence over Interstate Highway 10 to Los Angeles, and return over the same route, serving no intermediate points.

The application was referred to the examiner for hearing and the recommendation of an appropriate order thereon. Hearing was held October 4, 5, and 6, 1965, at El Paso, Tex.

Applicant is presently in the real estate and export business in El Paso. He asserts services identical to that he here proposes now exist, on a purported expense-sharing basis, and that some four to six operators openly advertise in Mexican newspapers. Applicant proposes to pick up passengers in Juarez, Chi., and leave from an El Paso terminal. He would operate a westbound schedule leaving El Paso at 6 p.m., (M.S.T.), stopping at Lordsburg, N. Mex., for dinner, changing drivers at Gila Bend, Ariz., stopping at Calexico for breakfast, arriving Los Angeles

at 8:45 a.m. (P.S.T.). An eastbound schedule would do the same thing, stopping at Calexico for dinner and Lordsburg for breakfast. The exact distance between applicant's two planned terminals is 848 miles. Applicant selected the route sought to avoid heavy traffic over the shorter route through Phoenix. His proposed running time is 14 hours, 50 minutes, with stops of 30 minutes at Lordsburg, for dinner (westbound), 15 minutes at Gila Bend to change drivers, and 10 minutes at Calexico for breakfast.

Applicant will use five new 9-passenger station wagons, to be purchased for $17,000 cash. He will handle baggage below the seats and on a roof rack. They will be air-conditioned, with individual seats belts, if available, and earphone radio attachments for each passenger.

Applicant proposes to transport not over eight passengers in a vehicle, and is willing to limit the application accordingly. If more than eight prospective passengers are available, he will dispatch a second car. He proposes to allow a 10 percent discount on round-trip tickets, provide half-fare tickets for children under 12, and charge no fare for infants.

Applicant hopes in the future to make arrangements with one of the four Mexican bus lines serving Juarez for through transportation to and from points beyond Juarez.

Applicant will pay his drivers $2.50 an hour, and provide lodging in Gila Bend. Drivers will lay over 24 hours at Gila Bend, and one car will be stationed at Gila Bend in case one of the regular schedules should experience a breakdown.

Applicant knows that some five cars a day now leave Juarez in the existing unauthorized service, and therefore anticipates no difficulty in obtaining traffic.

Applicant's proposed fare is $25.80, which matches what he believes the unauthorized operators normally charge. (However, they vary fares after attracting one or two

passengers). He estimates annual expenses at $92,654, including depreciation and reserves of $5,000 for unforeseen expenses and $2,500 for spare parts and repairs. These expenses include two employees in Los Angeles and one each in Juarez and El Paso. With an average of 6 passengers per trip, he estimates an annual gross operating revenue of $13,004, and a net profit of $20,349. Applicant's personal net worth as of December 31, 1964, was $208,360.

In July 1963, applicant filed an application seeking the same authority here sought. An Operating Rights Review Board reversed the examiner therein and denied the application, finding that existing service was adequate and that

> "Although the features which applicant would offer might be attractive to a limited portion of the traveling public, we are not persuaded that they are so distinctive as to transform what is essentially a regular-route, point-to-point service into a new and specialized type of motor carrier operation for which there is a public demand."

Applicant's petition for further hearing was denied October 28, 1964, and the instant application was filed shortly thereafter.

Applicant will arrange to have prospective passengers picked up in Juarez by a taxi company which proposes to charge 50 cents per passenger, assuming he has more than one passenger per trip. For a single passenger he will charge 75 cents or $1.00. The cab driver presently takes passengers to Greyhound and Trailways Terminals in El Paso. He cannot transport passengers from El Paso to Juarez.

Another taxi company, operating 45 taxis with drivers who speak Spanish, plans to provide service between downtown Juarez and applicant's departure point, charging $2.00 for each trip regardless of number of passengers.

Estrella Blanca Auto Buses serves between Juarez and four States of Mexico, using large buses. It sells tickets to Juarez, but not to or from United States points. The witness does not know if his company will make arrangements with applicant, but it has no other connection at present. It has 11 arrivals in Juarez daily. Both Greyhound and Trailways have connecting lines in Mexico.

A merchant and wrestling referee from Juarez travels to Los Angeles six to eight times a year, sometimes in connection with bouts he referees in Tijuana. He takes about 18 pounds of clothes and his referee uniform with him, and sometimes travels with three or four wrestlers. About once a year he takes his wife and six children with him. He has used the services which advertise in the Juarez newspaper for the past three years. Before that, he used Greyhound, but the trip took 20 hours as compared with about 15 hours by car. He also used Trailways and rail service. He will use the proposed service because he believes it has the advantages of (1) being safer, with new cars; (2) having heated and air-conditioned cars; (3) being faster; and (4) providing insurance. He expects to travel more often than at present if this service is made available. He prefers to go to Tijuana from Los Angeles because he can obtain car transportation, whereas if he went from Juarez to San Diego he would have to take a bus from San Diego to Tijuana.

A merchant from Monterrey travels to Los Angeles through El Paso eight to ten times a year, one of these trips being a pleasure trip. He takes about 22 pounds of baggage with him, and goes mostly by means of the car trips advertised in the paper. He does not understand English and considers it important that the driver speak Spanish. He used Greyhound but found it inconvenient because baggage on the rack above the seats may be stolen, and it is difficult to sleep on the bus. He prefers car travel because, in addition to overcoming those two deficiencies,

it is faster. Also, bus windows do not open, and sometimes the air-conditioning is not working properly. He does not prefer reclining seats because of his long legs. Although the advertisements offer to share expenses, the witness states that he does not really share expenses; the driver tells the passengers how much the fare is before they board the car.

A restaurant owner in El Paso travels to Los Angeles eight to ten times a year, carrying 15 to 20 pounds of baggage. Some of these trips are business trips, some to visit relatives. He has not used Greyhound since an incident two years ago in which he considered a remark by the driver to be "discriminatory." He also used Trailways until two years ago; and used it many times. The Trailways buses were clean, and the drivers were courteous, "sometimes"; however, sometimes they would not answer the witness when he asked a question.

A Juarez attorney makes 10 to 12 trips to Los Angeles a year, principally on business, carrying 25 pounds of luggage. He travels with his wife and 3 children. Some trips are made in his own car, others in the cars advertised in the paper. He has used Trailways and Greyhound, but considers the service unsatisfactory because he must stand in line to buy a ticket, then stand in line to board the bus, and then spend more time in transit than with a car. The buses were clean and comfortable, and their being equipped with a toilet was an advantage. In 1965 to the date of the hearing, he had made three trips in advertised cars and five trips in his own car. He expects to be picked up at his house.

A Lt. Colonel in the Mexican Army stationed at Chihuahua makes two trips a month to Los Angeles carrying 20 to 25 pounds of luggage. The actual purpose of the trips, which are made in the company of two companions, is to perform military duties at Tijuana, and the routing through Los Angeles is shorter and cheaper than any route within Mexico. He and his companions use the autos advertised

in the paper. He used Greyhound on three occasions some two years ago, but the buses do not have reserved seats, the drivers leave the lights on and make it difficult to sleep; the drivers do not speak Spanish, and on one occasion his luggage was lost and he waited in the terminal 5½ hours until it arrived. He has not investigated the Trailways service.

A jeweler from Guadalajara travels to Los Angeles six to eight times a year, with 18 to 24 pounds of baggage. He has used Greyhound, Trailways, and the advertised autos. Greyhound was used as recently as four months prior to the hearing; Trailways 7 or 8 months before the hearing. Greyhound lost his baggage and it took two days to retrieve it. He also has difficulty understanding the announcements of departures at bus terminals. He believes applicant will provide pillows, as Greyhound does. The cars he now uses pick him up and take him directly to his destination, and he believes applicant will provide the same service. He sometimes buys in both Los Angeles and El Paso, which is one reason for making the trip through El Paso.

It was stipulated that 14 residents of Juarez, two from Aguas Calientes, and one each from Guadalajara, El Paso, Terreon, San Luis Potosi, and Monterrey, would, if called, testify substantially the same as the foregoing public witnesses both on direct and cross examination. Only one of these 21, and one of the witnesses testifying, supported applicant's prior application seeking this authority.

National Bus Traffic Association opposes the application because it would provide direct competition to intercity bus carriers even though a limousine and Spanish-speaking drivers would be used. Its membership includes all intercity regular-route carriers, including limousine services, possibly rail subsidiaries, operating in the United States, Canada, and Mexico. The witness admits one difference in this application is Spanish-speaking drivers, but considers this just a "frill."

It publishes a tariff on behalf of the other protestants herein naming a one-way fare of $28.40 between El Paso and Los Angeles. The family plan fare (one full fare plus one 75 percent fare), is $49.70. Children's fare (12-22 years), are 75 percent of the regular fare and (under 12) 75 percent of that amount. A mid-week round-trip fare of 1½ times the normal one-way fare, or $42.60, is also available.

Transcontinental Bus System, Inc., and American Buslines, Inc., are members of the Trailways system, serve El Paso, and operate between El Paso and Los Angeles, both over the route here sought (as far as Yuma, thence through San Diego), and over a 50-mile shorter route through Phoenix, Ariz., and Blythe, Calif. The route through Phoenix and Blythe is 846 miles; the route through Yuma is 856 miles.

The evidence relates only to American Bus Lines, as these are its routes. The Trailways system has 5 schedules a day in each direction between El Paso and Los Angeles, using approximately 40 Silver Eagle buses. Also, it has standby equipment at major points between these termini. These schedules are designed to leave and arrive at times considered most convenient.

It has empty seats and can transport more passengers; the average number of empty seats on its five westbound schedules, per day, during May, 1965, leaving El Paso and arriving at Los Angeles, respectively, were 27.4, 31.2, 22.3, 18.9, 22.6, 27.3, 21.5, 28.6, 28.5, and 32.8. In the reverse direction, the departure and arrival averages were 41.8, 36.1, 32.1, 32.1, 35.9, 31.6, 29.4, 30.1, 31.2, and 25.4.

Elapsed times on its schedules vary from 17 hours 55 minutes to 21 hours 5 minutes, depending both on the route of movement and the amount of time spent at rest and meal stops.

Between September 1, 1964 and June 30, 1965, it sold at El Paso a total of 368 one-way tickets and 87 round-trip tickets to Los Angeles. Between January 1 and August 31,

1965, at Los Angeles, it sold 209 one-way and 42 round-trip tickets to El Paso.

It announces all arrivals and departures in Spanish at its El Paso terminal, and has done so for five years. Fourteen of its 18 El Paso employees speak fluent Spanish.

It connects with Omnibus de Mexico Fletcha Rojas at El Paso. Its representative is aware of the unlawful passenger car operations and in fact some of these operators solicit in the Trailways terminal. It has reported this to the Commission.

It advertises in newspapers, on the radio and on television, and it employs city solictors.

Greyhound Lines, Western Division operates between El Paso and Los Angeles over a route through Phoenix and Blythe, and also operates between El Paso and San Diego, and between Los Angeles and San Diego. It operates 8 schedules in each direction each day between Los Angeles and El Paso, having an elapsed time of between 17 hours 50 minutes and 20 hours 20 minutes.

It has two pools of buses licensed to operate through the four States involved, totaling 380 buses. All are equipped with lavatories, air conditioning, and reclining seats. It also has drivers stationed along the route.

Greyhound connects with Transportes Chihuahuences in El Paso, and also has a vice-president whose sole duty is the stimulation of Mexican traffic. It advertises in Spanish on the radio in Los Angeles, El Paso, San Diego, Phoenix, and Tucson, and has definite plans to advertise in Spanish on television, in Los Angeles. It has a Spanish-speaking employee always on duty at each terminal on this route, and all arrivals and departures are announced in Spanish.

Its witness does not believe applicant's proposed running time attainable, since he would have to average 57 m.p.h., to travel 848 miles in 14 hours 40 minutes, and night speed limits would be in effect.

During August 1965, buses arriving in El Paso from points west contained a total of 30,258 seats, 9,982 of which were empty. In the reverse direction, buses departing El Paso contained 28,905 seats, 11,691 of which were empty. The same relationships exist for the months of November 1964, and February and May, 1965, except that the totals are considerably lower (e.g., 16,898 total seats arriving and 16,773 departing in November), indicating a substantial increase in passengers.

Greyhound can and does put on extra sections as needed, and asserts it never dispatches a schedule from a terminal point with standees. The evidence shows that it generally operates two sections on all of its El Paso-Los Angeles schedules, and sometimes three.

It asserts that travel by private automobile has increased rapidly, and that air travel, and particularly a new military air standby policy, have seriously affected its traffic. Rising labor costs and rising cost of new equipment also contribute to its financial burden. It believes still another source of diversion would be quite serious.

The examiner agreed to take official notice of the gross and net operating revenues of American Buslines and Western Central Greyhound Lines Division for the year 1964, and the first two quarters of 1965. These figures are as follows:

Year: 1964	American	Western Greyhound
Operating Revenue	$14,391,943	$147,923,321
Net Operating Revenue	896,855	25,047,030
Net Income	549,563	15,312,926
1st Q. 1965		
Operating Revenue	$ 2,607,325	$ 30,770,461
Net Operating Revenue	(382,431)*	1,317,425
Net Income	(410,411)*	1,024,935
2nd Q. 1965		
Operating Revenue	$3,805,291	$ 37,513,558
Net Operating Revenue	333,115	4,936,609
Net Income	336,244	3,156,407

* Denotes Deficit

It is stipulated that both companies handle mail and express. Thus, an unidentifiable percentage of the above figures is produced by such traffic.

DISCUSSION AND CONCLUSIONS

Applicant's prior application seeking this authority was denied upon the ultimate conclusion that:

> Although the features which applicant would offer might be attractive to a limited portion of the travelling public, we are not persuaded that they are so distinctive as to transform what is essentially a regular-route, point-to-point service into a new and specialized type of motor carrier operation for which there is a public demand. *D. C. Transit System, Inc., Extension—Limousine Service,* 81 M.C.C. 737.

The quoted sentence is, except for the final phrase, a direct quote from the *D. C. Transit* case cited. The finding is, therefore, that the two cases are identical. Whatever the evidence was in the prior application, the evidence in the present case does not warrant the conclusions in the *D. C. Transit* case. The *D. C. Transit* application was denied on the grounds (1) that there were only five witnesses supporting the luxury limousine service proposed and that there was no substantial public demand for it; (2) that the witness had not tried the existing service and found it wanting; (3) that the service proposed was, therefore, simply a point-to-point service and not a "new and distinctive type of service," and (4) that a grant would jeopardize the existing services because the proposed competitive fares would attract the same passengers as were now using the existing services.

In the instant proceeding, 27 witnesses support the application and some of them travel with their families or associates. They have used the existing bus service and found it wanting in many respects (although the evidence

establishes that protestants do announce arrivals and departures in Spanish, contrary to the understanding of one witness). The language barrier is, nevertheless, real. It is not difficult to picture the frustration attendant upon waiting in a bus terminal five hours for one's luggage, and not being able to speak English. Nor is it difficult to imagine the feelings of one not able to speak English when other passengers laugh at a driver's comment about that person's country. The evidence leaves no doubt but that there is a definite need simply for a more considerate service; all the reasons advanced by the witnesses for no longer using protestants are valid and indeed compelling ones.

But beyond that, the service proposed is in fact distinctive. It will assure the witnesses and those they are representative of that their baggage will arrive with them; it will afford them more comfort than a bus, it will afford faster service. In this latter connection, protestants offered opinion evidence that applicant could not maintain his proposed schedules because his vehicles would be operating under night-time speed limits. This grave opinion was unaccompanied by evidence of what those speed limits are. Speed limits are matters of common knowledge in the motor carrier industry, however, and are published in the Rand-McNally Road Atlas. The examiner will therefore take official notice from the Rand-McNally Road Atlas, 1965, that the night speed limits in Arizona and New Mexico are 60 m.p.h., and in California and Texas, as pertinent, are 65 m.p.h. Applicant's proposed average speed of 57 m.p.h., is attainable, and, in fact, part of the reason for the route chosen by applicant is to avoid having to traverse Phoenix. Applicant has traversed the route and actually attained that speed and transit time.

Arrangements will be made for taxi service to and from applicant's departure point in El Paso; the drivers will speak Spanish—a feature which appears necessary here—and applicant will have a definite fare in effect; an ad-

vantage over the existing unlawful limousine operators. Applicant will also carry insurance, which the unlawful operators probably do not. And, finally, the success of applicant's operations may tend to reduce the amount of unlawful operations. At the same time, his success will in no way affect the protestants adversely, as they have already lost all the passengers who comprise applicant's potential. While they no doubt provide adequate bus service, it has been a tenet of this Commission from the earliest days of regulation that a distinctive type of passenger service would justify a grant of authority despite the existence of other passenger carriers. *Pan American Bus Lines Operations,* 1 M.C.C. 190 (1936). In short, as to passenger operations, "available service" does not equate with "adequacy of service," and the emphasis must be on "public convenience" rather than mere "necessity." *All American Bus Lines, Inc., Common Carrier Application,* 18 M.C.C. 755, 776 (1939). The examiner concludes that the application should be granted.

One further matter requires comment. The question was raised whether the five vehicles applicant proposes to purchase will meet the requirements of this Commission's Motor Carrier Safety Regulations governing passenger-carrying vehicles. Section 190.3 of those regulations defines "bus" as "any motor vehicle designed, constructed, and used for the transportation of passengers, including taxicabs." While applicant's exhibit shows his proposed Vista-Cruiser station wagons to be less than 80 inches wide, and hence not subject to the lamp and reflector requirements of section 193.12, they will be 9-passenger vehicles. Section 193.61 of the regulations, relating to window area and vehicle escape facilities, excepts from its provisions vehicles having a seating capacity of eight or less, but required stated glass area "for each seated passenger space provided, *inclusive of the driver* . . .". It is clear, therefore, that even though one of the nine seats is occupied by the

driver, the regulation applies to the vehicle. It cannot be determined from the evidence herein whether the vehicles applicant proposes to purchase meet the requirements of this section, but, if not, then another type of vehicle must be used.

Other sections of the regulations also except "buses" having a seating capacity of eight or less, but without stating that the driver must be included in the count. While applicant proposes to transport not more than eight *passengers,* he is advised that the use of none-passenger station wagons will subject him to all of the safety regulations; in particular sections 193.95 and 193.96.

FINDINGS

Upon consideration of all evidence of record, the examiner finds that the present and future public convenience and necessity require operation by applicant as a common carrier by motor vehicle, over regular routes, in interstate or foreign commerce, of passengers and their baggage, in limousine service, between El Paso, Tex., and Los Angeles, Calif., from El Paso over Interstate Highway 10 to Las Cruces, N. Mex., thence over U. S. Highway 80 through Lordsburg, N. Mex., to the New Mexico-Arizona State line, thence over Arizona Highway 86 to Benson, Ariz., thence over U. S. Highway 80 to Tucson, Ariz., thence over Arizona Highway 84 to Gila Bend, Ariz., thence over U. S. Highway 80 through Yuma, Ariz., to junction California Highway 98, thence over California Highway 98 to Calexico, Calif., thence over California Highway 86 (formerly U. S. Highway 99), to Indio, Calif., thence over Interstate Highway 10 to Los Angeles, and return over the same route, serving no intermediate points.

The examiner further finds that applicant is fit, willing, and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act and

with the Commission's rules and regulations thereunder; and that an appropriate certificate should be issued.

In view of the findings herein, the examiner recommends that the appended order be entered.

By Bernard J. Hasson, Jr., Hearing Examiner

(Signature) BERNARD J. HASSON, JR.
Recommended by Bernard J. Hasson, Jr., Hearing Examiner
(Signature) BERNARD J. HASSON, JR.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the day of , A. D., 1966.

No. MC-125115 (Sub-No. 2)

LOUIS ROSENBAUM, COMMON CARRIER APPLICATION

Investigation of the matters and things involved in this proceeding having been made, said application upon due notice having been heard by the examiner, who has made and filed a report herein containing his findings of fact and conclusions thereon, which report is hereby made a part hereof, and said proceeding having been duly submitted:

It is ordered, That upon full compliance with the requirements of sections 215, 217, and 221(c) of the Interstate Commerce Act, and with our rules and regulations thereunder, a certificate be issued to applicant authorizing operations, in interstate or foreign commerce, as a common carrier by motor vehicle of passengers and their baggage, between the points, over the routes, and in the manner described in the findings in the said report.

It is further ordered, That the application in all other respects be, and it is hereby, denied.

It is further ordered, That unless compliance is made by applicant with the requirements of sections 215, 217, and 221(c) of the act within 90 days after the date of service of a notice to the parties that this order has become effective as the order of the Commission, or within such additional time as may be authorized by the Commission, the grant of authority made in said report shall be considered as null and void and the application shall stand denied in its entirety effective upon the expiration of the said compliance time.

And it is further ordered, That this order shall be effective on

By the Commission, Division 1.

N. NEIL GARSON,
Secretary.

(SEAL)

APPENDIX D

Service Date
November 9, 1966

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, Acting as an Appellate Division, held at its office in Washington, D.C., on the 6th day of September, A. D. 1966.

No. MC-125115 (Sub-No. 2)

LOUIS ROSENBAUM COMMON CARRIER APPLICATION
(El Paso, Tex.)

Upon consideration of the record in the above-entitled proceeding, and of:

(1) Petition of National Bus Traffic Association, Inc., protestant, filed June 6, 1966, for reconsideration;

(2) Petition of Greyhound Lines, Inc., protestant, filed June 22, 1966, for reconsideration;

(3) Joint petition of American Buslines, Inc., and Transcontinental Bus System, Inc., protestants, filed June 22, 1966, for reconsideration;

(4) Reply by applicant, filed August 1, 1966;

and good cause appearing therefor:

It is ordered, That the said petitions be, and they are hereby, denied, for the reason that the findings of Operating Rights Review Board Number 3 are in accordance with the evidence and the applicable law;

It is further ordered, That, unless compliance is made by applicant with the requirements of Sections 215, 217, and 221(c) of the Interstate Commerce Act, within 90 days after the date of service of this order, or within such additional time as may be authorized by the Commission, the grant of authority made in the decision and order entered herein on April 28, 1966 shall be considered as null and void and the application shall stand denied in its entirety effective upon the expiration of the said compliance time.

By the Commission, Division 1, acting as an Appellate Division.

H. NEIL GARSON,
Secretary.

(SEAL)

APPENDIX E

Service Date
December 22, 1966

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 14th day of December, 1966.

No. MC-125115 (Sub-No. 2)

LOUIS ROSENBAUM COMMON CARRIER APPLICATION
(El Paso, Tex.)

Upon consideration of the record in the above-entitled proceeding, and of:

(1) Petition of the National Bus Traffic Association, Inc., protestant, filed November 21, 1966, for a determination and announcement that the proceeding involves an issue of general transportation importance;

(2) Joint petition of Greyhound Lines, Inc., American Bus Lines, Inc., and Transcontinental Bus System Inc., protestants, filed November 25, 1966, for a determination and announcement that the proceeding involves an issue of general transportation importance, or in the alternative, for further hearing;

(3) Alternate joint petition of Greyhound Lines, Inc., American Bus Lines, Inc., and Transcontinental Bus System, Inc., protestants, filed November 25, 1966, for reopening and rehearing;

and good cause appearing therefor:

It is ordered, That the petitions be, and they are hereby, denied for the reasons (1) that in the judgment of the Commission no issue of general transportation importance is involved in this proceeding and (2) no sufficient or proper

cause appears for reopening this proceeding for further hearing or rehearing.

By the Commission.

(SEAL)

H. NEIL GARSON,
Secretary.

APPENDIX F

NATIONAL TRANSPORTATION POLICY

[*September 18, 1940.*] [*49 U. S. C., preceding §§ 1, 301, 901, and 1001.*] It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

ISSUANCE OF CERTIFICATE

SEC. 207. [*August 9, 1935.*] [*49 U. S. C. § 307.*] (a) Subject to section 210, a certificate shall be issued to any quali-

fied applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

APPENDIX G

This report will not be printed in the permanent series of Motor Carrier Reports of the Commission.

INTERSTATE COMMERCE COMMISSION

SERVICE DATE
MAY 4, 1967

No. MC-128601

GLYNN S. BOLES COMMON CARRIER APPLICATION

Decided April 27, 1967

Public convenience and necessity found not shown to require operation by applicant as a common carrier by motor vehicle, over irregular routes of passengers and their baggage, in round-trip charter operations, between Greenwood, S. C., and Atlanta, Ga. Application denied.

Francis B. Nicholson for applicant.

Joseph P. Tuohy for protestant.

REPORT OF THE COMMISSION

OPERATING RIGHTS REVIEW BOARD NUMBER 2
MEMBERS CHANDLER, BOYLE, AND MAY

BY THE BOARD:

The modified procedure has been followed, and the matter has been assigned to the Board for disposition.

By application filed September 13, 1966, Glynn S. Boles of Greenwood, S. C., seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of passengers and their baggage, in round-trip, charter operations, between Greenwood, S. C., and Atlanta, Ga. Greyhound Lines, Inc., opposes the application.

Applicant holds authority from the South Carolina Public Service Commission to provide charter service (1) for school and church groups, from points and places in Greenwood County, S. C., to points and places in South Carolina, and (2) for other groups (a) between points and places in Greenwood County and Charleston, Orangeburg, Columbia, and Atlantic Beach, S. C., and (b) between points and places in Greenwood County and points and places within 60 miles thereof. In addition, applicant has a municipal bus franchise to transport passengers within Greenwood, S. C. He teaches high school auto mechanics and shop courses and owns and operates an automobile service station, a wrecker service, and a bus service. He has received from several individuals and groups requests for bus transportation to major league baseball games in Atlanta, Ga., and attributes the frequency of these requests to his being a Negro, as are those who have approached him for service. He believes that the proposed service would be used exclusively by persons of his race, who would not hesitate to deal with him but would be reluctant to use existing carriers because of the difficulty in making advance arrangements and in obtaining the required minimum number of

passengers. He doubts that these persons will use existing service if the application is denied and that a grant thereof would deprive existing carriers of any traffic.

Nine public witnesses support the application. They include an elementary school principal, a high school teacher-coach, a funeral director, a textile worker, and a contractor. The principal of the school where applicant teaches describes him as a person of outstanding moral character. An oil distributor, who has dealt with applicant for several years, describes him as an able and substantial business man. Eight witnesses describe themselves as residents of the Greenwood area, and seven described themselves as Negroes. Eight believe the proposed service would be used by a substantial number of Greenwood residents, and that it would be particularly responsive to the needs of the Negro community. All nine believe the proposed service needed for transportation to and from baseball games in Atlanta, Ga.

Greyhound Lines, Inc., holds motor common carrier authority to transport passengers over, and incidental authority to provide charter service in the area surrounding, a specified regular route between Greenwood and Atlanta. Over this route it provides daily, scheduled service. It has in the considered area 648 buses. From 1951 to 1965 its revenue from passenger operations declined from 99.3 percent to 77.1 percent, and its revenue from charter operations increased from 1.9 percent to 5.2 percent. It advertises in an Atlanta newspaper its charter service to Atlanta baseball games and has provided such service for groups at Newberry, Columbia, and Charleston, S. C. In the two years before the instant proceeding, Greyhound performed eight charter movements for the school where applicant teaches and thereby earned $3,677.50.

Since the dawn of motor carrier regulation the Commission, before authorizing additional motor service, has given careful consideration to the existing carriers' authority, willingness, and ability to perform the proposed service.

In 1936, shortly after Congress had extended the Commission's jurisdiction to interstate for-hire motor carriers, the Commission said:[1]

> The question, in substance, is whether the new operation or service will serve a useful public purpose, responsive to a public demand or need; whether this purpose can and will be served as well by existing lines or carriers; and whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest.

While it is not absolutely essential that an applicant establish that existing transportation are inadequate, this is normally one of the ingredients basic to the determination of public convenience and necessity.[2] The Commission has repeatedly indicated that in the absence of exceptional circumstances, existing carriers are entitled to all the traffic they can handle adequately, efficiently, and economically within the limits of their authorities before a new, competing service is authorized.

In this proceeding, the evidence establishes that protestant has appropriate authority and adequate equipment, and fails to establish that protestant is unable or unwilling to provide the desired service. Protestant has performed passenger charter operations, apparently without complaint, in the involved area in general and, in particular, for the school with which applicant and one of the supporting witnesses are connected. In the circumstances, we cannot conclude that there is any justification for departing from the general rule that existing carriers should be allowed to handle the available traffic without added competition if they are able to provide adequate service. The public support for the application stems wholly from the

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[1] *Pan-American Bus Lines Operation*, 1 M.C.C. 190, 203.

[2] See *Hudson Transit Lines* v. *United States*, 82 F. Supp. 153, 157.

desire of a group of Negroes to patronize applicant's service. There is no showing, or even a suggestion, that protestant has discriminated against any of these persons, and our rules expressly forbid any such treatment.[3] We have no alternative, therefore, but to deny the application.

We find that applicant has failed to establish that the present and future public convenience and necessity require the proposed operation; and that the application should be denied.

An appropriate order will be entered.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Operating Rights Review Board Number 2, held at its office in Washington, D.C. on the 27th day of April, 1967.

No. MC-128601

GLYNN S. BOLES COMMON CARRIER APPLICATION

Investigation of the matters and things involved in this proceeding having been made, and said review board, on the date hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby made a part hereof:

It is ordered, That said application be, and it is hereby, denied.

By the Commission, Operating Rights Review Board Number 2.

H. NEIL GARSON,
Secretary.

(SEAL)

OP-OR-14

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[3] *Discrimination—Interstate Motor Carriers of Passengers,* 86 M.C.C. 743, *aff'd. sub nom. Georgia* v. *United States,* 201 F. Supp. 813, *aff'd. per curiam,* 371 U.S. 9; 49 C.F.R. § 180a.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1312

NATIONAL BUS TRAFFIC ASSOCIATION, INC., ET AL., *Appellants*,

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees*

On Appeal From the United States District Court for the Northern District of Illinois, Eastern Division

Motion To Affirm

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Dated: May 10, 1968

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1312

NATIONAL BUS TRAFFIC ASSOCIATION, INC., ET AL., *Appellants*,

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees*

On Appeal From the United States District Court for the Northern District of Illinois, Eastern Division

Motion To Affirm

Pursuant to Rule 16 of the Rules of this Court (adopted June 12, effective October 2, 1967) appellee, Louis Rosenbaum, d/b/a El Paso-Los Angeles Limousine Express, intervening defendant below, moves to dismiss this appeal for the reason that the appeal presents no substantial question reviewable by this Court.

STATEMENT OF THE CASE

This is a direct appeal from a final judgment of a three-judge district court (J.S. 1a) dismissing appellants' complaint seeking to set aside an order of the Interstate Commerce Commission. The Court below has so succinctly, yet completely, stated the case (see

Appendix A of the Jurisdictional Statement), that any such statement here seems superfluous.

QUESTIONS PRESENTED

Appellants undertake to set up four questions. The first three merely present different factual questions on rather insignificant phases of matters considered by the Interstate Commerce Commission.

The fourth undertakes to raise a question of law which has many times been determined adversely to Appellants. No one of these is substantial.

ARGUMENT

The scope of judicial review of administrative decisions is limited and well defined by many decisions of the Courts. Certainly it does not involve, as Appellants seem to think, reconsideration by this Court, or even the Court below, of the entire matter heard by the administrative agency. If this was so, an appeal would be turned into a trial *de novo*.

A long line of landmark decisions by this Honorable Court and those below, hold that orders of the Commission should not be set aside, disturbed or modified by a Court on review, even though the Court might have reached a different conclusion, if the decision is within the scope of the Commission's statutory authority and is based upon adequate findings supported by the evidence.[1]

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[1] *U.S. vs. Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 534-536 (1946); *Rochester Telephone Corp. vs. U.S.*, 307 U.S. 125, 139 (1939); *Virginian Ry. Co. vs. U.S.*, 272 U.S. 658, 663-666 (1926).

This has been established law for more than half a century. In *I.C.C. vs. Union Pacific Ry. Co.*, 222 U.S. 541, 547-548, this Honorable Court set forth the general principle that a court considering mixed questions of law and fact should confine itself to the ultimate question of whether the Commission acted within its statutory power. This Court held that it should not consider the expediency or wisdom of the order, or whether it would have made the same ruling. A reviewing Court should not examine the facts upon which the Commission has based its order further than for the limited purpose of determining whether the record contains substantial evidence to support the Commission's ultimate conclusions. There should be no substitution of the Court's view for that of the Commission upon matters which have been committed to the Commission's exclusive determination by the Congress, if the Commission's conclusion is supported by the record and applicable law.[2]

The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.[3]

And the question whether public convenience and necessity requires the grant of a certificate is administrative and accordingly for the Commission rather

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[2]See Also: *Carolina Scenic Coach Lines vs. U.S.*, 56 F. Supp. 801, 803-804 (1946), affirmed 323 U.S. 678; *Swayne & Hoyt, Ltd. vs. U.S.*, 300 U.S. 297, 304; *Federal Communications Com. vs. WOKO, Inc.*, 329 U.S. 223, 229; *Barrett Line, Inc. vs. U.S.*, 326 U.S. 179, 199.

[3]*Mississippi Valley Barge Lines vs. U. S.*, 292 U.S. 282, 286-287; *Southern Kansas Greyhound Lines vs. U.S.*, 134 F.Supp. 502, 506, affirmed 351 U.S. 921 (1956).

than the Courts.[4]

In *Virginian Ry. vs. United States*, 272 U.S. 658, 665-666, heretofore referred to, Mr. Justice Brandeis writing, said:

> "This Court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it. *I.C.C. vs. Union Pacific R.R. Co.*, 222 U.S. 541."

In *Interstate Commerce Commission vs. Parker*, 306 U.S. 60 at page 65, it is said:

> "The purpose of Congress was to leave to the Commission authoritatively to decide whether additional motor service would serve public convenience and necessity. Cf. Powell v. United States, 300 U.S. 276, 287, 81 L ed 643, 651, 57 S Ct 470. This, of course, gives administrative discretion to the Commission, cf. McLean Trucking Co. v. United States, 321 U.S. 67, 87, 88, 88 L ed 544, 556, 557, 64 S Ct 370, to draw its conclusion from the infinite variety of circumstances which may occur in specific instances."

It follows *a fortiori* that the Commission did not err, as Appellants seem to argue, about the alleged inconsistency with findings made in other proceedings before it.

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[4] *I.C.C. vs. Parker*, 326 U.S. 60; *U.S. vs. Detroit & Cleveland Nav. Co.*, 326 U.S. 236; *Alton R. Co. vs. United States*, 326 U.S. 179; *Rochester Telephone Corp. vs. U.S.*, 307 U.S. 125; *Merchants Warehouse Co. vs. U. S.*, 283 U.S. 501; *United States vs. Pierce Auto Freight Lines*, 327 U.S. 515; and innumerable others.

CONCLUSION

Appellants have failed to present an appealable question of substantial importance within the jurisdiction of this Honorable Court and the judgment of the district court should be affirmed.

Respectfully submitted,

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Attorney for Intervening Defendant Appellee, Louis Rosenbaum, d/b/a El Paso-Los Angeles Limousine Express

PROOF OF SERVICE

I, T. S. Christopher, attorney for the intervening defendant-appellee, Louis Rosenbaum, d/b/a El Paso-Los Angeles Limousine Express, hereby certify that on the 10th day of May, 1968, I served copies of the foregoing Motion to Affirm on the several parties to this action as follows:

1. Upon the United States by mailing a copy duly addressed and postage prepaid to each of the following:

Edwin N. Griswold, the Solicitor General, Donald F. Turner, Assistant Attorney General, John H. D. Wigger, Attorney, Department of Justice, Washington, D. C. 20530; and Edward V. Hanrahan, United States Attorney, 219 South Dearborn Street, Chicago, Illinois 60604.

2. On the Interstate Commerce Commission by mailing a copy duly addressed and postage prepaid to each of the following:

Robert W. Ginnane, General Counsel, and Steven Kazan, Attorney, Interstate Commerce Commission, Washington, D. C. 20423.

3. By mailing a copy duly addressed and postage prepaid to each attorney of record for Appellants as follows:

Joseph Tuohy and Robert J. Bernard, 10 South Riverside Plaza, Chicago, Illinois 60606; D. Paul Stafford and Warren A. Goff, 315 Continental Avenue,

Dallas, Texas 75207; Drew L. Carraway, John S. Fessenden, and Richard R. Sigmon, 618 Perpetual Bldg., Washington, D. C. 20004.

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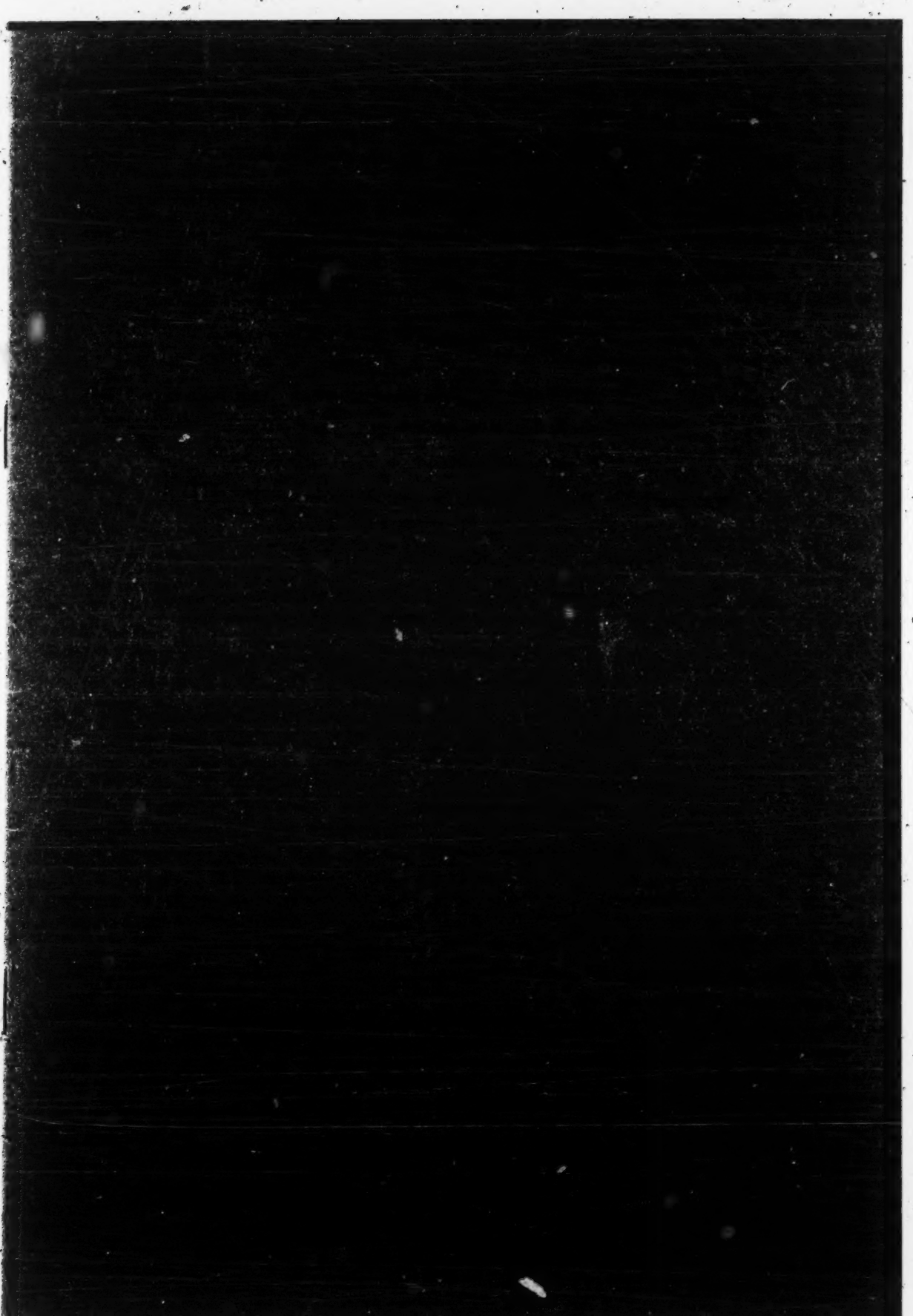

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1312

NATIONAL BUS TRAFFIC ASSOCIATION, INC., ET AL.,
APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court (J.S. 6a) dismissing appellants' suit to set aside an order of the Interstate Commerce Commission (J.S. 7a-8a) which granted a certificate of public convenience and necessity to Louis Rosenbaum, doing business as El Paso-Los Angeles

299-744—68

Limousine Express of El Paso, Texas (hereinafter referred to as Rosenbaum). The certificate permits the operation of a limousine service with Spanish-speaking drivers between El Paso and Los Angeles. Appellants are bus lines which operate between El Paso and Los Angeles and a national association of bus lines.

On January 5, 1965, Rosenbaum filed an application for the certificate, and, upon protests by the appellants, a full hearing was held. Twenty-seven witnesses appeared in support of the application (J.S. 20a). The testimony disclosed that persons of Mexican ancestry who live in El Paso, or at nearby points in Mexico, and who travel between El Paso and Los Angeles, are confronted by a language barrier.[1] They are often confused even though the appellant bus lines have Spanish speaking employees at their terminals and announce departures and arrivals in Spanish. It was also testified that a passenger's luggage did not always arrive at his destination with him. In addition, several witnesses testified that they found a limousine service more comfortable and that they preferred the faster limousine service (J.S. 14a-16a, 21a). The testimony also revealed that "wildcat" limousine services are currently operating between Juarez (across the Mexican border from El Paso) and Los Angeles, and that a number of persons use those illegal operators rather than appellants' bus services (J.S. 12a). The

[1] The language barrier was graphically demonstrated by the fact that none of the witnesses who testified in support of the application could read, write or speak English, and all of their testimony was laboriously elicited through an interpreter.

hearing examiner found that the proposed service would be "distinctive" on the basis of four elements: more comfort, faster service, movement of luggage on the same vehicle with passengers, and use of Spanish speaking drivers (J.S. 21a). He also found that Rosenbaum's potential market consisted largely of those persons already lost by appellants to the wildcat operations and, therefore, that the appellants would not be adversely affected by Rosenbaum's success (J.S. 22a). The Commission's Operating Rights Review Board No. 3 adopted the examiner's report and granted the application subject to certain conditions not here relevant (J.S. 7a-8a). Division 1 of the Commission and the full Commission denied petitions for further consideration (J.S. 25a-26a, 27a-28a).

The court below affirmed, concluding that the Commission's order was based on adequate findings supported by substantial evidence (J.S. 1a–5a).

ARGUMENT

This appeal does not present a substantial question warranting plenary review by this Court. The Commission's determination was based primarily on factual considerations (J.S. 11a–20a), which were carefully reviewed by the district court (J.S. 1a–4a). The evidence need not be reviewed again by this Court. *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 490–491.

The Commission concluded that the existing bus service, while generally adequate otherwise, does not adequately meet the particular needs and convenience

of Spanish speaking travelers. The Commission fully explained its principal findings:

> The language barrier is, nevertheless, real. It is not difficult to picture the frustration attendant upon waiting in a bus terminal five hours for one's luggage, and not being able to speak English. Nor is it difficult to imagine the feelings of one not able to speak English when other passengers laugh at a driver's comment about that person's country. The evidence leaves no doubt but that there is a definite need simply for a more considerate service; all the reasons advanced by the witnesses for no longer using protestants are valid and indeed compelling ones. [J.S. 21a.][2]

The Commission's findings that the proposed limousine service would solve baggage problems and would be faster and more comfortable than the existing bus

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[2] The consideration of the language factor is not, as appellants urge, a sharp departure from the Commission's previous policy. The Commission has considered the language factor in many cases when determining the public convenience and needs. See *Martinez Common Carrier Application*, 78 M.C.C. 25 (1958); accord: *Bracero Transp. Co., Inc.—Migrant Workers*, 78 M.C.C. 461 (1958), *Matura Trucking Corp. Contract Carrier Operation*, 68 M.C.C. 766 (1956). Furthermore, the Commission's decision in this respect is not, as appellants suggest (J.S. 6–7), inconsistent with *Glynn S. Boles Common Carrier Application*, Docket No. MC–128601, decided April 27, 1967, reprinted on pp. 29a–33a in the jurisdictional statement. In *Boles*, the Commission found that witnesses favored the application merely on grounds of racial preference, without a showing of discrimination by the existing service (J.S. 32a–33a); here the examiner found that the witnesses had experienced serious language difficulties when travelling on appellants' buses.

service are additional support for the Commission's decision.

The appellants' principal contention seems to be that the existing service is adequate and that the added features of the proposed limousine service are merely "extras" (J.S. 5) or are "trivial" (J.S. 10) and do not justify the risk of impairment of the revenues of the existing service (J.S. 10, 11).[3] However, the Commission clearly found no risk of substantial impairment of the appellants' revenues since most of the passengers who will use the proposed service are already lost to appellants anyway. As for the value to the public of the added features in the proposed service, the Commission has broad discretion in determining the public convenience and necessity, *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60, 65, and, as the court below concluded, its decision is well within its lawful discretion.

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[3] There is no need to reach the question raised by appellants (J.S. 9–10) whether the finding that the proposed service would reduce the illegal operations is in itself a proper ground for the Commission's decision, since that finding was not crucial to the decision (see J.S. 22a). A similar finding by the Commission was approved in *Trailways of New England, Inc.* v. *United States*, 235 F. Supp. 509, 513 (D.D.C.).

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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MAY 1968.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

NATIONAL BUS TRAFFIC ASSN., INC., ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 1312. Decided May 27, 1968.

PER CURIAM,

The motions to affirm are granted and the judgment is affirmed.